not made until May 12, 1941. During the period from August 9, 1935, the date the Federal Motor Carrier Act was approved, until May 12, 1941, Craig conducted himself and complied with the rules, regulations and requirements of that act as applied to a contract carrier. The provisions of section 206 (a) and of section 209 (a) of the Interstate Commerce Act to the effect that "Pending the determination of any such application the continuance of such operation shall be lawful" were designed to protect applicants during the interim period against charges of illegality.

Section 217 (a) of the Interstate Commerce Act provides, among other things:

> "Any tariff so rejected by the Commission shall be void and its use be unlawful."

As the joint tariffs of the respondent and the Phoenix-El Paso Express were never rejected by the Commission, it follows that such tariffs were not void and without force and effect during the period the shipments in question moved. As was stated in *Toy Toy* v. *Hopkins*, 212 U. S. 540, 547, it rarely happens that things are wholly void and without force and effect as to all persons and for all purposes. To the same effect are *A. C. L.* v. *Florida*, 295 U. S. 301; and *Chicot County Drainage Dist.* v. *Baxter*, 308 U. S. 371.

The Phoenix-El Paso Express assigned its assets, including all choses in action, to the Phoenix-El Paso Express, Inc., the petitioner. The latter brought suit as assignee of the partnership, Phoenix-El Paso Express, against the respondent for the difference between the charge of 45 cents per hundred lbs., the amount of the division of the joint through rate which the partnership agreed to accept, and the local rate of 85 cents applicable to traffic from El Paso to Phoenix, as published in the local tariffs of the partnership. Judgment was rendered in the District Court in favor of petitioner on the theory that although the parties had agreed to a division of the through rate, the local rate of 85 cents was legally applicable and that petitioner

was entitled to recover on that basis. An appeal was then taken by respondent to the Court of Civil Appeals of the 8th Supreme Judicial District of Texas.

While the appeal was pending, Congress passed Public Law No. 558, Seventy-seventh Congress, Second Session, approved May 16, 1942, known as Part IV of the Interstate Commerce Act. This Act of May 16, 1942, contained Section 419, which reads as follows:

> "*Section 419.* No person shall be subject to any punishment or liability under the provisions of this Act on account of any act done or omitted to be done, prior to the effective date of this part, in connection with the establishment, charging, collection, receipt, or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to this Act."

The Court of Civil Appeals held that by reason of the passage of the Act of May 16, 1942, any cause of action which plaintiff might have had no longer existed. (Opinions of Court of Civil Appeals pages 41 to 50, and page 55, in Transcript.) The Supreme Court of Texas came to the same conclusion. (Opinion of Supreme Court pages 63 to 73 in Transcript.)

## B. ARGUMENT.

I. The report of the Committee on Interstate and Foreign Commerce, House of Representatives, Seventy-seventh Congress, First Session, Report 1172, supports the construction given to Section 419 by the Supreme Court of Texas, and confirms the view of that Court with reference to the constitutionality of Section 419. The following statements are taken from that Report:

> "SECTION 419. LIABILITY FOR PAST ACTS AND OMISSIONS
>
> "As has been previously explained in this report, freight forwarders and common carriers by motor vehicle subject to part II have been for a number of

years operating under joint rates which, by reason of the decision of the Commission in the *Acme case,* and in the other freight forwarder cases, they probably had no authority to establish and observe, even though the Commission's orders in those cases have not yet become effective. As a result of this, various persons may have subjected themselves to penalties and liabilities under Federal statutes, even though during the period of operation under such joint rates there may have been no deliberate intention to violate the law, and no way of knowing for certain whether they were violating the law. Freight forwarders may be liable on account of failure to pay the regular published tariff rates of common carriers by motor vehicle. Common carriers by motor vehicle may be subject to liability because of failure to collect from freight forwarders their regularly published local rates. It is possible that shippers may also technically be subject to liabilities.

"This section relieves freight forwarders, common carriers by motor vehicle, and other persons from penalties and liabilities under the Interstate Commerce Act or any other Federal Statute on account of anything done or omitted to be done, prior to the enactment of part IV, in connection with the establishment, charging, collection, receipt or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to part II.

"Common law and contractual rights, remedies and liabilities are not affected by this provision.

"The validity of this section, insofar as it relieves persons of liability to fines, penalties, and forfeitures running to the United States is beyond doubt, and insofar as it relieves persons of liability to individuals good authority exists for such action.

"The courts are generally agreed that rights of action based upon purely statutory grounds may be abolished by the legislature even after they have accrued (16 C. J. S. Constitutional Law Sec. 254; Ewell v. Daggs, 108 U. S. 143 (1883); Hazzard v. Alexander, 36 Del. 212, 173 A. 517 (1934); Wilson v. Head, 184 Mass. 515, 69 N. E. 317 (1904); cf. Carson v. Gore-Meenan, 229 Fed. 765, 767 (1916). The courts have

been particularly uniform in reaching this conclusion where the right of action is in the nature of a claim by an individual for the recovery of a statutory fine, penalty, or forfeiture (Ewell v. Daggs, 108 U. S. 143 (1883); Lemon v. Los Angeles Terminal Co., 38 C. A. (2) 659, 102 P. (2) 387 (1940); Anderson v. Byrnes, 122 Calif. 272, 54 P. 821 (1898); Denver & R. G. Ry. Co. v. Crawford, 11 Col. 598, 19 P. 673, 674 (1888). The authority of Congress or a State legislature to validate voluntary transactions between parties which at the time they were entered into were by statute invalid or illegal has been upheld by the United States Supreme Court in several cases (West Side R. R. v. Pittsburg Construction Co., 219 U. S. 92 (1910); McNair v. Knott, 302 U. S. 369, 372 (1937)."

(See also *Gross* v. *U. S. M. T. G. Co.*, 108 U. S. 477, 27 Law Ed. 795; *Lewis* v. *F. & D. Co.*, 292 U. S. 559, 54 Sup. Ct. 848.)

## II. Part IV of the Interstate Commerce Act, if Construed to Prevent Plaintiff from Recovering Rates in Excess of Those Agreed Upon at the Time of the Shipments, is Not in Violation of the Constitution of the United States.

### 1. When Congress, in the exercise of its constitutional power to regulate Interstate Commerce, establishes a policy, existing conditions which would conflict with the execution of that policy, are not protected by the Fifth Amendment.

The Constitution of the United States provides:

"The Congress shall have power . . .

"To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes; . . . — And

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."

(Article I, Section 8, Clauses 3, 18.)

The pertinent provisions of Amendment V to the Constitution of the United States are as follows:

> ". . . nor (shall any person) be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

In passing Section 419 of the Act approved May 16, 1942, Congress was exercising a power conferred upon that body by the Constitution of the United States, namely the power to regulate interstate commerce. The decisions of the Supreme Court conclusively establish that the provisions of the Fifth Amendment may not be invoked to frustrate or obstruct the carrying out of a national policy which Congress has the power to adopt.

No better statement with reference to the power of Congress in such a situation can be found than the statement contained in the opinion in *Norman* v. *B. & O. R. Co.*, 294 U. S. 240.

Chief Justice Hughes, speaking for the Court, said (pp. 307-308):

> "This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. See *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 357.
>
> "This principle has familiar illustration in the exercise of the power to regulate commerce. If shippers and carriers stipulate for specified rates, although the rates may be lawful when the contracts are made, if Congress through the Interstate Commerce Commission exercises its authority and prescribes different rates, the latter control and override inconsistent stipulations in contracts previously made. This is so, even

if the contract be a charter granted by a State and limiting rates, or a contract between municipalities and carriers. *New York* v. *United States*, 257 U. S. 591, 600, 601. See, also, *Armour Packing Co.* v. *United States*, 209 U. S. 56, 80-82; *Union Dry Goods Co.* v. *Georgia Pub. Serv. Corp.*, 248 U. S. 372, 375."

In *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, the Court said (pp. 485-486):

"We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived."

*Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U. S. 603, arose under the Federal Employers' Liability Act of April 22, 1908. A contract executed prior to the effective date of that Act was involved. The contention was made that the Act could not have the effect of changing previously existing relationships and agreements. In overruling this contention, the Supreme Court said (pp. 613-614):

"Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place, to this extent,

the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose, by prophetic discernment, to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which, as to future action, should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority."

In *Brotherhood of Railroad Shop Crafts* v. *Lowden*, 86 F. (2d) 458, the contention was made that Section 2 of the Railway Labor Act of 1934 could not abrogate an existing contract, because this would be in violation of the Fifth Amendment. The Court said (p. 461):

"The fact that the parties here were bound by an existing contract at the time the act became effective is no basis upon which to invoke the due process clause of the Fifth Amendment. The privilege of contract is not unrestricted. The right to make contracts which relate to interstate commerce must be exercised subject to the paramount power of Congress to enact appropriate legislation touching the subject matter. Any other rule would proscribe Congress in the exercise of its constitutional prerogative to regulate commerce among the states. The contract here was subject to the exercise of that power . . ."

(a) *The only restriction imposed by the Fifth Amendment upon Congress in the exercise of its constitutional powers is that its actions shall not be arbitrary, capricious and unreasonable, and that the means selected shall have a real and substantial relation to the end sought to be achieved.*

The above rule is illustrated and sustained by the following quotation from the opinion in *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, at p. 311:

". . . the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or ca-

pricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decision of the Congress as to the degree of the necessity for the adoption of that means, is final. *M'Culloch* v. *Maryland, supra,* (4 Wheat. 421, 423); Legal Tender Case (*Julliard* v. *Greenman*), *supra,* (110 U. S. 450); Stafford v. Wallace, 258 U. S. 495, 521; *James Everard's Breweries* v. *Day,* 265 U. S. 545, 559, 562."

(b) *Section 419 bears a real and substantial relation to the end sought to be achieved, and is not an arbitrary, capricious or unreasonable exercise of Congressional power.*

Prior to the enactment of the Motor Carrier Act, 1935, the freight forwarding industry performed a recognized and useful function in the national transportation system.

The declaration of policy adopted by Congress September 18, 1940, and set forth in Section 1 of the amendment to the Interstate Commerce Act of that date, stated the policy of Congress to be "to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers . . .—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." This policy of Congress could not be realized effectively so long as the doubt and confusion resulting from the decision in the *Acme case* existed.

What would be the purpose of, or advantage in, the passage by Congress of Part IV of the Interstate Commerce Act regulating freight forwarders if the financial structure of the freight forwarders should be so weakened by claims such as those involved in this case that they could no longer perform their proper function? That Congress recognized

the existence of the problem, and Section 419 was intended to provide a final solution is abundantly clear from the Congressional reports.

It is apparent from the language of Section 419 that Congress adopted as the solution of the problem the comprehensive policy of settling definitely and for all time every question of criminal and civil liability that had arisen by granting complete immunity from all liability to every person involved.

**2. In order to fall within the protection of the Fifth Amendment, rights must be founded either in contract or in grant, and they must consist in something more than the mere expectation of a benfit to be derived from the continued existence of a statute.**

While petitioner contends that its suit for recovery is based upon a contractual right and not upon the statute, it is clear that as the rate which was the subject of the contract made at the time the shipments moved has been paid petitioner, and the contract therefore fulfilled, that petitioner has no standing to maintain the suit unless the right of action is found in section 217 (b) of the Interstate Commerce Act. That section imposes upon every common carrier subject to the provisions thereof the duty to collect the published tariff charges applicable to a particular shipment. The rate of such a carrier as to interstate commerce is not properly the subject of a contract. Therefore, petitioner did not acquire the right to maintain the action by virtue of any rate that might be the subject of a contract, express or implied. Nor did the existence of the contract or the performance of the service contemplated thereby give the petitioner any vested right to exact a particular rate or charge. On the contrary, the only charge that was the subject of a contract was the charge of 45 cents per hundred lbs. accepted by petitioner. As Congress by section 217 created the obligation on the part of a common carrier to collect the legally applicable published rates, it

follows that Congress can modify or abolish such obligations. That is precisely what Congress did by section 419 of the Interstate Commerce Act. This Court has held that Congress has the right to make legal, actions and transactions which may have been illegal. *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; *United States* v. *Heinszen*, 206 U. S. 370; *Charlotte Harbor Ry.* v. *Wells*, 260 U. S. 8; *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139.

Section 217(b) of the Motor Carrier Act does not give the Plaintiff or other common carriers by motor vehicle a "right" of action for the recovery of their rates and charges. This Section simply imposes upon common carriers by motor vehicle a "duty" to collect the "charges specified in the tariffs in effect at that time" (49 U. S. C. A., Section 317(b)). The provisions of Section 217(b) are almost identical with those of Section 6(7) of Part I of the Interstate Commerce Act. It is clear from the decisions of the Supreme Court arising under the latter section that the right of action for the recovery of charges specified in the applicable tariffs is inferred by necessary implication from the duty imposed by the statute, and is not created by the express language of the statute itself. *L. & N. R. Co.* v. *Maxwell*, 237 U. S. 94, 97-98.

In *G. H. & S. A. Ry. Co.* v. *Webster*, 27 Fed. (2d) 765, the Court, in speaking of the right of the carrier to sue for undercharges, said: "Its right to sue is given by the Interstate Commerce Act."

The right of action is merely a necessary corollary of the duty imposed upon the carrier to collect the charges prescribed by law. If the right did not exist, the duty could be nullified, and the policy of the Act defeated. *L. & N. R. Co.* v. *Maxwell*, 237 U. S. 94, 97-98; *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, 482-483.

Section 217(b) of the Act does not exist primarily for the benefit of the Plaintiff. The primary purpose of this Section was to prevent the charging of unreasonable rates, and to prohibit unjust discrimination between shippers, and

any benefits which might accrue to Federal motor carriers are merely incidental consequences of the achievement of the principal objective of this Section.

Section 419 of Part IV of the Interstate Commerce Act has relieved the Plaintiff of any duty which may have existed to charge and collect the rates which they now claim to be due. Since the duty no longer exists, any right which the Plaintiff may have had to sue for the recovery of those rates falls.

Even though the rights asserted by the Plaintiff should be considered as in some sense "contractual", the contract is with respect to a subject over which Congress has power to act, and the contractual rights are, therefore, subject to a "congenital infirmity". (*Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 308.)

(b) *Where the sovereign power of the Government has, by statute, created or sanctioned the existence of a right which otherwise would not exist, such right may be taken away by a subsequent statute.*

In *Graham* v. *Goddcell*, 282 U. S. 326, the Court, speaking through Chief Justice Hughes, said (pp. 429-430):

> "It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist."

The claims which the Plaintiff is asserting are strictly analogous to a claim for the refund of a tax which has been paid through mistake. In such a case, the taxpayer is not entitled to a refund in the absence of a statute authorizing a recovery. If such a statute is repealed during the pendency of an action to secure a refund, and before a final judgment has been recovered and collected, the taxpayer has no redress. *People, ex rel. Eitel* v. *Lindheimer*, 371 Ill. 367, 371-375; *Southern Service Co.* v. *Los Angeles County*, 15 Calif. (2d) 1, 11-13, 97 Pac. (2d) 963.

In the *Lindheimer case*, the Court said (p. 373):

> "That the legislature cannot pass a retrospective law impairing the obligation of a contract, nor deprive a citizen of a vested right, is a principle of general jurisprudence, but a right, to be within its protection, must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another. If, before rights become vested in particular individuals, the convenience of the State induces amendment or repeal of the laws, these individuals have no cause to complain."

The same result was reached by the Supreme Court of California after an exhaustive consideration of the Constitutional question in *Southern Service Co.* v. *Los Angeles County, supra.* In that case, an appeal to the Supreme Court of the United States was dismissed in 310 U. S. 610, and a petition for re-hearing was denied, 310 U. S. 658.

An analogous case is *U. S.* v. *Standard Oil Co. of California* (D. C. Cal.), 21 F. Supp. 645, affirmed 107 F. (2d) 402, Certiorari denied 309 U. S. 654, petition for re-hearing denied 309 U. S. 697.

Section 419 leaves the parties in exactly the same position as they were at the time Plaintiff's assignor transported the shipments for the Defendant and was paid in full for

such transportation on the basis of the agreements between the parties for a division of joint rates. The effect of Section 419 is, therefore, to validate the agreements for division of rates between the partnership and the Defendant, if indeed such agreements were invalid.

In *McNair* v. *Knott, Treasurer of the State of Florida,* 302 U. S. 362, the Supreme Court, in an opinion by Mr. Justice Black, said:

> "There is nothing novel or extraordinary in the passage of laws by the Federal Government and the States ratifying, confirming, validating, or curing defective contracts. Such statutes, usually designated as 'remedial', 'curative', or 'enabling', merely remove legal obstacles and permit parties to carry out their contracts according to their own desires and intentions. Such statutes have validated transactions that were previously illegal relating to mortgages, deeds, bonds and other contracts. Placing the stamp of legality on a contract voluntarily and fairly entered into by parties for their mutual advantage takes nothing away from either of them. No party who has made an illegal contract has a right to insist that it remain permanently illegal. Public policy cannot be made static by those who, for reasons of their own, make contracts beyond their legal powers. No person has a vested right to be permitted to evade contracts which he has illegally made."

It is significant that in its report on the scope and effect of Section 419 the House Committee on Interstate Commerce cited both *McNair* v. *Knott,* 302 U. S. 362, and *West Side Belt R. Co.* v. *Pittsburgh Construction Co.,* 219 U. S. 92.

In *Ewell* v. *Daggs,* 108 U. S. 143, the Supreme Court said:

> "The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving

clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld as against all objections, on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. The very point was so decided in the following cases (citing a number of cases).

"And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty which is taken away by a repeal of the Act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that, whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which contrary to law he actually made is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this Court (citing a number of cases).

"The right which the curative or repealing Act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect."

In *Gross* v. *U. S. Mortgage Company*, 108 U. S. 477, the Supreme Court said:

"That the act in question is not repugnant to the Constitution, as impairing the obligation of a contract is, in view of the settled doctrines of this court, entirely clear. Its original invalidity was placed by the court below upon the ground that the statutes and public policy of Illinois forbade a foreign corporation from taking a mortgage upon real property in that State to secure a loan of money. Whether that inhibition should

be withdrawn was, so far at least as the immediate parties to the contract were concerned, a question of policy rather than of constitutional power. When the legislative department removed the inhibition imposed, as well by the statute as by the public policy of the State, upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not in a suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt."

## III. Part IV of the Interstate Commerce Act, When Properly Construed, Prevents Plaintiff From Recovering in This Case.

There is no warrant for the Plaintiff's assertion that the word "liability", as used in Section 419, is limited solely to the criminal liabilities and penalties imposed by the Interstate Commerce Act. There is nothing in the language of this section, or in the reports of the Congressional Committees, to indicate that the term "liability" was intended to be confined to criminal liabilities and penalties. It must be conceded that the term "liability" is broad enough to comprehend both civil and criminal liability. The plain language of Section 419 will not tolerate the construction for which Plaintiff is contending.

The exact language of the section is:

"Liability for Past Acts and Omissions

"Sec. 419. No person shall be subject to any punishment or liability under the provisions of this Act on account of any act done or omitted to be done, prior to the effective date of this part, in connection with the establishment, charging, collection, receipt, or payment of rates of freight forwarders, or joint rates or divi-

sions between freight forwarders and common carriers by motor vehicle subject to this Act."

Certainly the heading, "Liability for Past Acts and Omissions" is comprehensive enough to include any civil liability of the Defendant to the Plaintiff under the Interstate Commerce Act. The precise words used in the text itself are "punishment or liability". It does not require resort to the dictionary to establish that the word "punishment", in accepted uses, implies the pains and penalties, both imprisonment and fines, imposed for violation of a criminal or penal statute, while the word "liability" is used more often to describe an obligation imposed by law for the payment of sums of money, and the use of the disjunctive "or" indicates that Congress had this distinction in mind.

Moreover, the immunity granted by Section 419 extends specifically to liabilities arising "in connection with . . . joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to this Act".

The proceedings before the Committees of Congress show clearly that the Act was intended to relieve freight forwarders of liability on claims of the very character asserted by the Petitioner in this case. The Committee reports leave no doubt about the construction which should be placed upon Section 419.

## IV. The Fact That Plaintiff had Recovered a Judgment in the Trial Court, From Which an Appeal was Being Prosecuted, Will Not Save Plaintiff's Alleged Cause of Action From the Blight of Section 419.

A number of the cases which we have already cited sustain our position.

In the case of *West Side Belt R. Co.* v. *Pittsburgh Construction Co.*, 219 U. S. 927, to which we have referred, a suit had already been brought, and had finally terminated with a judgment denying a recovery on the contract which was illegal under the laws which existed at the time the

contract was made, and at the time the suit was brought. Thereafter, the bar of the statute was removed by new legislation. Another suit was brought on the contract, and recovery was permitted.

In the case of *Galveston H. & H. R. Co.* v. *Anderson*, 229 S. W. 998 (Court of Civil Appeals, Galveston, Writ Ref.), the Court said:

> "We think this contention should be sustained. In 1 Lewis' Sutherland's Stat. Cons. Sec. 282, p. 544, the general rule affecting causes of action arising upon a law, but tried after the repeal of such law, is stated as follows:
>
> 'The general rule is that where an act of the Legislature is repealed without a saving clause it is considered, except as to transactions passed and closed, as though it had never existed.'
>
> "Again, in section 285, p. 552, the author further states the rule as follows:
>
> 'When a cause of action is founded on a statute, the repeal of the statute before final judgment destroys the right, and the judgment is not final in this sense so long as the right of exception thereto remains.'
>
> "In *State* v. *T. & N. O. R. R. Co.*, 58 Tex. Civ. App. 528, 125 S. W. 53, heretofore cited, it is stated:
>
> 'By the repeal of a statute by a later statute on the same subject, all acts or omissions in violation of the former statute are pardoned, and the penalties incurred thereunder are no longer enforceable.'
>
> "We quote from Goodrich v. Wallis, 143 S. W. 285:
>
> 'The fact that the plaintiff's suit was pending at the time of the passage of the last act could make no difference; for it is well settled that if a statute, giving a special remedy, is repealed without a saving clause in favor of pending suits, all suits must stop where the appeal finds them; and, if final relief has not been granted before the repeal goes into effet, it

cannot be granted thereafter.' (Citing a number of cases.)

. . . .

"In *Norris* v. *Crocker*, 13 How. 429, 14 L. Ed. 210, referred to in Ex parte McCardle, it is stated:

'As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject-matter. And in the next place, as the plaintiff had no vested right in the penalty, the Legislature might discharge the defendant by repealing the law.' "

In *Dickson et al.* v. *Navarro County Levee Imp. Dist. No. 3, et al.*, 139 S. W. (2d) 257, the Supreme Court of Texas adopted an opinion by Judge German, Commissioner, in which the following language appears:

"We have reached the conclusion that the effect of the Act of September 28, 1937, was to work an abatement of this suit, and that this makes it unnecessary to discuss other questions. It is almost universally recognized that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them, and if final relief has not been granted before the repeal goes into effect, it cannot be granted thereafter. A like general rule is that if a right to recover depends entirely upon a statute, its repeal deprives the court of jurisdiction over the subject matter."

If, as petitioner insists, the joint published rate on file with the Commission during the time the shipments in question moved violated the provisions of Part II of the Interstate Commerce Act, Petitioner would be subject to the criminal penalties provided in section 222 of that act (49 U. S. C. A. 322) except for section 419. Under its own theory and by its own admission, Petitioner is *particeps criminis*. Its position is that it should be free to mulct the respondent, or any other freight forwarder similarly situated, in a civil action for what it claims to have been the legal charges, while at the same time relying on section 419

for exoneration from the penalties provided in section 222 of the Interstate Commerce Act. Neither justice nor reason lend any support to the proposition that section 419 may or should be construed so as to permit Petitioner to enrich itself at the expense of respondent and at the same time receive immunity from all criminal penalties provided in the Interstate Commerce Act.

We respectfully submit that the petition should be denied.

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May 12, 1944.